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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1233

STUCKEY'S STORES, INC., a Delaware Corporation, Individually and as a Representative on behalf of Its Franchisees in the State of New Mexico,

Appellant,

v.

FRED O'CHESKEY, Chief Highway Administrator, State Highway Department,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW MEXICO

RESPONSE TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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The Appellee moves the Court to dismiss the appeal herein or in the alternative to affirm the judgment of the Supreme Court of New Mexico on the ground that the questions on which the decision of the cause depends have been decided by the Supreme Court of the State of New Mexico in accordance with the provisions of the United States Constitution and are so unsubstantial as to require no further argument or review by this Court.

ARGUMENT

I.

APPELLEE'S ARGUMENT THAT THE DECISION OF THE NEW MEXICO SUPREME COURT IS IN ACCORD WITH THE FIRST AMENDMENT IS PREMISED ON ITS MISCONCEPTION OF THE STANDARD TO BE APPLIED TO A STATUTE WHICH REGULATES SPEECH.

Appellee's argument in Point I of its Motion to Dismiss or Affirm relies on the basic premise that a legislative declaration of police power interests supporting a statute is to be accorded such weight that judicial review to determine whether such interests actually exist is precluded. Appellee relies on *Berman v. Parker*, 348 U.S. 26 (1954), as support for this proposition. This reliance is misplaced because of the essential difference between the type of judicial review which is accorded a statute when it is challenged under the due process clause of the Fourteenth Amendment and the type of judicial review accorded a statute which is challenged under the First Amendment. *Compare Berman* with *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977). *Berman* considered the ability of the government to exercise the power of eminent domain in connection with an urban redevelopment plan. The sole challenge in *Berman* was to the propriety of such action under the police powers doctrine; thus, *Berman* arose in the context of the due process clause. Faced with such a challenge this Court deferred to the legislative determination of the public interest.

This Court has, however, not applied the same mode of review to statutes which seek to regulate speech. In *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), the state was required

to offer real justifications which would support the restriction on speech. In *Linmark* the regulation of speech would be allowed only if there was a showing that the impact of the speech would actually be detrimental. Both of these requirements are in keeping with the admonition that the state must do more than make a bare assertion that the regulation is justified. *Carey v. Population Services International,* 431 U.S. 678, 696 (1977).

Throughout this case the State has maintained the posture that it may rely on the analysis found in due process cases such as *Berman*. It did this at trial by refusing to offer evidence in support of the statute. It did this on appeal by successfully arguing that legislative declarations alone are sufficient to justify the Act. And here, by merely reviewing the New Mexico Supreme Court's decision and utterly ignoring the factual and legal hurdles set out in the Jurisdictional Statement, it implicitly admits that the decision is a legalistic shell devoid of factual substance. In order to scale these hurdles the State again stands on the claimed inviolability of legislative declarations as justification for the infringement of Appellants' right to speak. The validity of such a posture is belied by this Court's cases dealing with First Amendment issues. *Linmark; Virginia Pharmacy Bd.; Carey*.

For these reasons, the Appellee's argument in support of the New Mexico Supreme Court's decision is without merit.

II.

PRIOR CASES WHICH HAVE BEEN DISMISSED BY THIS COURT SHOULD NOT BE CONTROLLING ON THIS COURT'S ACTION ON THE CASE AT BAR BECAUSE OF SIGNIFICANT DIFFERENCES BETWEEN THOSE CASES AND THIS CASE.

The Appellee urges that this Court affirm or dismiss this appeal based on the prior decisions in *Markham Advertising Co. v. State,* 73 Wash. 2d 405, 439 P.2d 248 (1968), *appeal dismissed,* 393 U.S. 316 (1969); *Newman Signs, Inc. v. Hjelle,* 268 N.W.2d 741 (N.D. 1978),[1] *appeal dismissed,* 440 U.S. 901 (1979); *State v. Lotze,* 92 Wash. 2d 52, 593 p.2d 881, *appeal dismissed,* ___ U.S. ___, 100 S. Ct. 257, 62 L. Ed. 2d 177 (1979); *Suffolk Outdoor Advertising Co. v. Hulse,* 43 N.Y.2d 483, 402 N.Y.S.2d 368, 373 N.E.2d 263 (1977), *appeal dismissed,* 439 U.S. 808 (1978); *Veterans of Foreign Wars v. Steamboat Springs,* 575 P.2d 835 (Colo.), *appeal dismissed,* 439 U.S. 809 (1978). Each of these cases is distinguishable from the case at bar because of factual or legal differences.

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[1]The State asserts in n.4 that Stuckey's offered no evidence to disprove the existence of a relationship of billboards to traffic safety. This is untrue. Stuckey's cross-examined a State's witness on defendant's Ex. 8 and demonstrated the following facts: (a) of the total highway miles in New Mexico, only 5.6% are interstate and primary highways; (b) out of the total highway miles traveled in New Mexico on all highways, less than 50% of the travel is on interstate and primary highways; (c) on a per mile basis of travel, the interstate and primary highways are much safer than other state highways and roads to which the Act does not apply, that is, the percentage of accidents on a per mile basis of travel is much lower on interstate and primary highways. If the Act is a safety regulation, why does it apply only to the safest highways? On this evidence, the trial court found that the Act does not have a safety purpose and Appellant does not read the New Mexico Supreme Court's decision as having justified the Act on safety grounds.

Markham Advertising was decided before this Court's decision in *Bigelow v. Virginia,* 421 U.S. 809 (1975). In *Markham* the Washington Supreme Court placed great reliance on *Valentine v. Chrestensen,* 316 U.S. 52 (1942). More recent cases from this Court have recognized that *Valentine*'s suggestion that the Constitution poses no barrier to restraint on commercial speech is to be limited to the facts in *Valentine. See, e.g., Bigelow.* Indeed, the Washington Supreme Court has recognized that the doctrinal stance of *Markham* has been eroded by subsequent decisions of thi Court. *Lotze,* 593 P.2d at 813. Thus, any reliance by the Appellee on *Markham* as a basis for dismissing or affirming this appeal is misplaced. *See also General Outdoor Adv. Co. v. Dept. of Public Wks.,* 289 Mass. 149, 193 N.E. 799 (1935); *Ghaster Properties, Inc. v. Preston,* 176 Ohio St. 425, 200 N.E.2d 328 (1964).

As to the *Hjelle, Lotze,* and *Hulse* cases there is an important factual distinction to be made between the types of signs which were at issue in those cases and the type of sign which is at issue in the case at bar. In *Hjelle* the signs were those of an advertising company which rented the signs to various advertisers. In *Hulse* the nature of the signs was similar to that in *Hjelle.* In *Lotze* the signs conveyed the political or social ideas of the owners. In none of these cases were the signs those of a roadside business trying to advertise its local concern. This distinction is of importance in weighing the asserted governmental interest against the sign owner's First Amendment interest. It is crucial to the determination of whether the statute in question allows for an effective alternative to replace the prohibited form of speech.

An example illustrates the important difference between the types of signs. A billboard company may

use roadside signs to advertise shaving cream; however, shaving cream may be as effectively advertised by ads in magazines or in other media. The same cannot be said for the roadside business. An ad in a national magazine will be virtually useless to the store in Santa Rosa, New Mexico. A spot on national television will not reach the person driving through New Mexico on his summer vacation. This factual distinction between the content of the signs at issue in prior cases and the content of the signs at issue in this case is sufficient basis for distinguishing those prior cases. *See also Donnelly Advertising Corp. v. City of Baltimore,* 279 Md. 660, 370 A.2d 1127 (1977); *John Donnelly & Sons v. Mallar,* 453 F. Supp. 1272 (D. Me. 1978); *John Donnelly and Sons v. Outdoor Advertising Bd.,* 339 N.E.2d 709 (Mass. 1975).

The California Supreme Court recognized the difference between applying a sign prohibition to an advertising company and to an advertiser such as a roadside business. In *Metromedia, Inc. v. City of San Diego,* 23 Cal. 2d 762, 154 Cal. Rptr. 212, 592 P.2d 728 (1979), the court stated:

> In the present litigation which pits only the owners of the billboards against the city, individual advertisers are not parties; such an advertiser retains the ability to assert that, owing to the absence of reasonable alternative means of communication, the ordinance cannot *be applied* to prevent him from using a billboard to proclaim his message.

Id. at n.14 (emphasis in original).

In addition, the legal status of the cases on which Appellee relies is different from that of Appellant's case. The most obvious example of this is the *Veterans of Foreign Wars* case. Therein the sign owners challenged the city sign code as overbroad, vague, and a prior

restraint. No comparable issues are raised in the case at bar. It should also be noted that the *VFW* case involved a challenge to the facial validity of a sign code. Thus the evidence was limited to alleged facial defects in the code. 575 P.2d at 838. This is a very different type of challenge than was made in the case at bar at which Appellant presented evidence of concrete harm which would come to their business if their signs were lost. *See also Metromedia.*

In *Newman* the sign owner presented no evidence in support of his First Amendment claim. 268 N.W.2d at 761. The same must be said of *Howard v. State Dept. of Hwys. of Colorado,* 478 F.2d 581 (10th Cir. 1973), because of the procedural posture in which the case arose.

It can be seen that none of the cases on which the Appellee relies is comparable to the case at bar. In none was there a factual showing comparable to that in the case at bar. In none were the legal issues raised in the same manner as they were in the case at bar. For these reasons, Point II of Appellee's Motion to Dismiss or Affirm is not dispositive of this appeal.

CONCLUSION

For the reasons given in Appellant's Jurisdictional Statement and in this Response, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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